

NORTHWEST PLANNERS' FORUM

July 27, 2005

Recent Decisions of the WWGMHB

May 15, 2005 – July 20, 2005

Accessory Dwelling Units (ADUs)

Allowing freestanding ADUs to build at this density permits an ADU in resource lands to be built on lots that do not meet the underlying density needed for two single-family dwelling units in resource lands. This provision as it applies to resource lands substantially interferes with RCW 36.70A.020(8), because it fails to conserve productive agricultural and forestry lands. It allows a conversion of those lands to residential purposes beyond the limits for a single residence in designated resource lands. *Friends of the San Juans et al. v. San Juan County*, Case No. 03-2-0003c (Compliance Order (2005), June 21, 2005)

Agricultural Lands

Lands otherwise eligible for designation as agricultural lands of long-term commercial significance may not be excluded simply on the basis of current use. Our State Supreme Court has ruled on this point (citing *City of Redmond v. Central Puget Sound Growth Management Hearings Board*, 136 Wn.2d 38, 53, 959 P.2d 1091, 1998 Wash. LEXIS 575 (1998)). *1000 Friends v. Thurston County*, WWGMHB Case No. 05-2-0002 (Final Decision and Order, July 20, 2005)

Parcel size itself does not correspond to farm size because it is not indicative of the amount of acreage that would be farmed together. Using predominant parcel size of 20 acres as a designation criterion may exclude viable farms in which the total acreage farmed is in excess of 20 acres in size but each of the parcels making up the farm is less than 20 acres. If size is to be used as a factor in designating agricultural lands, farm size rather than parcel size is the relevant consideration. *1000 Friends v. Thurston County*, WWGMHB Case No. 05-2-0002 (Final Decision and Order, July 20, 2005)

Agricultural Lands – Development Regulations

The County's solid agricultural conservation measures including large minimum lot sizes for Agricultural and Forest Resource Lands, buffering requirements for lands adjacent to agriculture, Right to Manage Resource Lands provision, and periodic notification to property owners of adjacent agricultural activity help mitigate the effects of lots that will be developed under this ordinance...Enforcement of the County's code requirements for concurrency flood damage prevention, drinking water systems, on-site sewage, shorelines protections, and critical areas

regulations helps mitigate the environmental impacts and the need for urban services...The County also requires lot certification to ensure substandard lots are legally platted. A certified lot can be conveyed but it cannot be developed unless the property owner can comply with all the other County development regulations, except minimum lot size. Additionally, the County disallowed the development of substandard lots of less than an acre on Fidalgo Island and Guemes Island until subarea plans for those areas are completed. *Evergreen Islands, et al. v. Skagit County*, Case No. 00-2-0046c (Compliance Order, May 19, 2005)

Burden of Proof – Compliance

In this decision, the Board finds that Petitioner has not met its burden of proof that the County's new regulation is less effective than the County's old lot aggregation ordinance for reducing substandard lots in NRLs and Rural Lands for the purpose of conserving agricultural lands, preventing sprawl, and precluding the need for urban services. *Evergreen Islands, et al. v. Skagit County*, Case No. 00-2-0046c (Compliance Order, May 19, 2005)

Capital Facilities Element

Instituting urban development regulations before the development of a compliant capital facilities plan will either preclude eventual future development at urban densities in the UGA when sewer is available, or permit densities that constitute sprawl. We understand the County's desire to establish this UGA to realize its legitimate economic development goals and its investment spent in years of planning for this area. Nevertheless, we cannot find the County's urban development code compliant or valid, until they have completed a compliant capital facilities plan. Development regulations that implement a non-compliant capital facilities plan do not themselves comply with RCW 36.70A.040, 36.70A.110(3), 36.70A.020(1), (2) and (12). *Irondale Community Action Neighbors, et al. v. Jefferson County*, WWGMHB Case No. 04-2-0022 (Final Decision and Order, May 31, 2005) and *Irondale Community Action Neighbors v. Jefferson County*, WWGMHB Case No. 03-2-0010 (Compliance Order, May 31, 2005)

Consolidation

...the consolidation of petitions in this case does not affect the petition filing requirements of the Growth Management Act for each underlying petition. These include the requirements that a party file its petition for review within 60 days of the publication of the challenged legislative enactment (RCW 36.70A.290(2)) and that each party have standing as to each "matter" raised for review (RCW 36.70A.280(2) and (4)). Consolidation of petitions is a procedural efficiency; it does not waive the filing and standing requirements for each individual petition that was consolidated. A party to one petition does not become a party to a consolidated petition by virtue of

the consolidation. *The Building Association of Clark County, et al v. Clark County* (Order Denying Motion to Dismiss, February 15, 2005)

Interim Ordinance

Adoption of an interim ordinance cannot cure non-compliance... The reason for this is that an interim ordinance will, by its terms, expire in a set period of time. Once the interim ordinance expires, the County will again be out of compliance. Given the statutory limitations on the Board's jurisdiction, expiration of the interim ordinance would not confer jurisdiction upon the Board to determine compliance and so the Board cannot determine compliance until a permanent amendment has been adopted. See RCW 36.70A.290(2) on the jurisdiction of the boards. *Friends of San Juans, Lynn Bahrych and Joe Symons v. San Juan County*, WWGMHB Case No. 03-2-0003c (Compliance Order (2005), July 21, 2005)

Intervention

A petitioner has rights to pursue its petition that a non-petitioner does not have. See, for example, RCW 36.70A.300(2)(b)(ii). The board procedures for intervention allow an interested party to participate in briefing and arguing the issues so that it may protect its interests in the board's decision. However, full petitioner status can only be obtained through filing a timely petition for review. *Futurewise v. Whatcom County*, WWGMHB Case No. 05-2-0013 (Order on Dispositive Motions, June 15, 2005).

Invalidity

We have held that a test for imposition of invalidity is whether the continued validity of the challenged and non-compliant enactment would interfere with proper planning in the future. *Vinatieri v. Lewis County*, WWGMHB Case No. 03-2-0020c (Compliance Order – 2005, January 7, 2005). In this case, the non-compliant comprehensive plan provisions and development regulations allowing urban levels of development without requiring urban levels of sewer service pose the danger that such development might vest in the new UGA before the County is able to adopt compliant development regulations. Such vested development would interfere with the County's ability to plan for adequate public sewer service to the new urban growth area, thus interfering with UGA goals for urban growth with adequate public facilities and services (Goal 1) and adequate public facilities and services to support development at the time the development is available for occupancy (Goal 12). *Irondale Community Action Neighbors, et al. v. Jefferson County*, WWGMHB Case No. 04-2-0022 (Final Decision and Order, May 31, 2005) and *Irondale Community Action Neighbors v. Jefferson County*, WWGMHB Case No. 03-2-0010 (Compliance Order, May 31, 2005)

Jurisdiction and Vested Rights

We do not render an opinion on the question of which applications for guest houses are subject to the vested rights doctrine. That decision is outside our purview.

Friends of the San Juans et al. v. San Juan County, Case No. 03-2-0003c (Compliance Order (2005), June 21, 2005)

Limited Areas of More Intensive Rural Development (LAMIRDs)

The County's high density rural residential designations (SR – 4/1; RR 2/1; RR 1/1; and RR 1/2); Housing and Residential Densities Policies 1 and 2, and Rural Land Use and Activities Policy 8; and the County's development regulations implementing these designations (T.C.C. Ch. 20.10; T.C.C. Ch. 20.11; T.C.C. Chapter 20.13; and T.C.C. Chapter 20.14) fail to comply with RCW 36.70A.070(5). The residential density levels allowed in these designations are too intensive for rural areas unless they are designated as limited areas of more intensive rural development (LAMIRDs) pursuant to RCW 36.70A.070(5)(d). If the County is to allow such areas of more intensive rural development, it must establish them in accordance with RCW 36.70A.070(5)(d). *1000 Friends v. Thurston County*, WWGMHB Case No. 05-2-0002 (Final Decision and Order, July 20, 2005)

Levels of Service (LOS)

For locally owned arterials, the County has discretion on how they choose to describe the LOS as long as it describes this in their comprehensive plan and use their description to measure LOS. For state-owned facilities, highways of state-wide significance are set by the state. For other state-owned highways the local government and the state work together to set the LOS. *Irondale Community Action Neighbors, et al. v. Jefferson County*, WWGMHB Case No. 04-2-0022 (Final Decision and Order, May 31, 2005) and *Irondale Community Action Neighbors v. Jefferson County*, WWGMHB Case No. 03-2-0010 (Compliance Order, May 31, 2005)

Market Factor

[t]he market factor does not apply to the population calculation – it is a “land market supply factor.” It applies to the calculation of land availability rather than to the calculation of the number of people to be accommodated. *Irondale Community Action Neighbors, et al. v. Jefferson County*, WWGMHB Case No. 04-2-0022 (Final Decision and Order, May 31, 2005) and *Irondale Community Action Neighbors v. Jefferson County*, WWGMHB Case No. 03-2-0010 (Compliance Order, May 31, 2005)

However, there is no explanation in the comprehensive plan for the use of a market factor, perhaps because the buildable lands analysis appears to already account for

many of the market vagaries in its own assessment of land availability... The buildable lands analysis assesses many of the potential market factors and incorporates them into the figures for land supply and demand that it produces. This analysis appears to take the place of a market factor. *1000 Friends v. Thurston County*, WWGMHB Case No. 05-2-0002 (Final Decision and Order, July 20, 2005)

Motions

The Board will not determine on motions whether the population allocation analysis dictates that the County take action on its UGA boundaries as part of its 2004 update because that is a fact-based determination. Therefore, the Board will carry this issue over to the hearing on the merits. *Futurewise v. Whatcom County*, WWGMHB Case No. 05-2-0013 (Order on Dispositive Motions, June 15, 2005).

[F]urther elucidation of the history and bases for the motion is needed for the Board to decide it. Petitioners assert that there is no genuine issue of material fact regarding the alleged failures to act. However, the County argues that it adopted development regulations to implement the Hartstine Subarea Plan in 1996. As to the open space corridor claims, Petitioners assert that those claims were reserved in this Board's compliance order of August 14, 2002. The County responds that it was found in full compliance on the open corridors issue by this Board's order of November 2, 2003. A fuller explanation of the history of these claims will be necessary for the Board to make a ruling. As a result, the issues will be held over to the hearing on the merits. *Overton v. Mason County*, WWGMHB Case No. 05-2-0009c (Order Denying Dispositive Motion, May 11, 2005)

Public Participation

[A] provision that makes an amendment of the PUD water plan an automatic amendment of the County's comprehensive plan does not comply with RCW 36.70A.130(2) and RWC 36.70A.140. (County Comprehensive plans) may not also provide that *future* amendments to the utility's plans are simply incorporated into (a) comprehensive plan without the opportunity for public review and comment during the County's comprehensive plan amendment process. *Irondale Community Action Neighbors, et al. v. Jefferson County*, WWGMHB Case No. 04-2-0022 (Final Decision and Order, May 31, 2005) and *Irondale Community Action Neighbors v. Jefferson County*, WWGMHB Case No. 03-2-0010 (Compliance Order, May 31, 2005)

Remand by Board

...the County has also asked the Board to remand this case to the County to take action on the challenged enactments and bring them into compliance with the GMA... This motion confuses two different board actions. If the board dismisses a petition for review upon the motion of all parties to it, then that ends the board's

jurisdiction over the case. At that point, there is no petition for review because it has been dismissed. A remand of a case, on the other hand, can only occur if the board finds that the challenged local legislative enactment is not in compliance with the Growth Management Act, State Environmental Policy Act or the Shorelines Management Act. RCW 36.70A.300(3). Since there has been no board finding of noncompliance, the board cannot “remand” the case to the County to bring the challenged ordinances into compliance. *The Building Association of Clark County, et al v. Clark County* (Order Denying Motion to Dismiss, February 15, 2005)

Rural Densities

This provision is of even greater concern because RR 1/5 is the *least* dense of the County’s rural residential designations. The determination of proper rural density levels depends in large measure upon the GMA’s strictures against promotion of sprawl. 48.3 percent of the County’s rural residential areas fall into the RR 1/5 category. CP Table 2-1A at 2-18 – 2-19. With such a large portion of the County’s rural area designated as RR 1/5, the net density level of one dwelling unit per four acres in the RR 1/5 zone increases the “conversion of undeveloped land into sprawling, low-density development in the rural area,” in contravention of RCW 36.70A.070(5)(c)(iii). *1000 Friends v. Thurston County*, WWGMHB Case No. 05-2-0002 (Final Decision and Order, July 20, 2005)

[W]here the rural designations and zones themselves do not include a variety of rural densities, the comprehensive plan and development regulations must demonstrate how the “innovative techniques” create such varieties of densities in the rural area. *1000 Friends v. Thurston County*, WWGMHB Case No. 05-2-0002 (Final Decision and Order, July 20, 2005)

Stipulation

The fact that the parties to other petitions have agreed to dismiss them does not require CCNRC to dismiss *its* petition. Under board rules, the Board can only dismiss a case when all parties stipulate to a dismissal. (WAC 242-02-720). It is not proper for the Board to dismiss the CCNRC petition without either a stipulation on the part of CCNRC to dismiss it or a final decision on the merits of the issues raised in that petition. *The Building Association of Clark County, et al v. Clark County* (Order Denying Motion to Dismiss, February 15, 2005)

Therefore, because Petitioner has not given the Board a tool for evaluating the effectiveness of these two measures, we are not persuaded that Ordinance 020040017’s approach to reducing substandard lots is less effective in reducing substandard lots in Resource and Rural Lands than the County’s current lot aggregation requirement, or is noncompliant. *Evergreen Islands, et al v. Skagit County*, Case No. 00-2-0046c (Compliance Order, May 19, 2005)

Urban Growth Areas (UGAs)

The size of any UGA must be based upon the projected population growth allocated to that UGA. Since the supply of urban residential lands (18,789 acres) significantly exceeds the projected demand for such lands over the course of the 20-year planning horizon (11,582 acres), the County's UGAs fail to comply with RCW 36.70A.110. *1000 Friends v. Thurston County*, WWGMHB Case No. 05-2-0002 (Final Decision and Order, July 20, 2005).

Because non-municipal UGAs may allow an extension of urban growth to areas that do not already have a governmental structure for the provision of urban levels of service, it is important to have a plan for the provision of urban services to the entire non-municipal UGA. If this cannot be done, the boundaries of the non-municipal UGA are likely too large. *Irondale Community Action Neighbors, et al. v. Jefferson County*, WWGMHB Case No. 04-2-0022 (Final Decision and Order, May 31, 2005) and *Irondale Community Action Neighbors v. Jefferson County*, WWGMHB Case No. 03-2-0010 (Compliance Order, May 31, 2005)

Updates

The GMA requires that the County adopt a resolution or ordinance finding that a review and evaluation has occurred. RCW 36.70A.130(1)(a). The County did this in Resolution 2005-06, finding that the County had "hereby completed its seven-year review pursuant to RCW 36.70A.130." Resolution 2005-06. Resolution 2005-06, therefore, constitutes the County's "update" and a petition for review of Resolution 2005-06 is the mechanism by which compliance may be challenged. *Futurewise v. Whatcom County*, WWGMHB Case No. 05-2-0013 (Order on Dispositive Motions, June 15, 2005).

The County's designation and regulation of limited areas of more intensive rural development must accord with the criteria in RCW 36.70A.070(5)(d). While those criteria were not in effect at the time that the County's comprehensive plan was first adopted, the update requirement applies to incorporate any GMA amendments into the review and revision of comprehensive plans and development regulations under RCW 36.70A.130. This motion to dismiss is denied. *Futurewise v. Whatcom County*, WWGMHB Case No. 05-2-0013 (Order on Dispositive Motions, June 15, 2005).

Now that there is direction in the GMA on how to address areas of more intensive rural development, the County's update must ensure that it complies with those terms. *1000 Friends v. Thurston County*, WWGMHB Case No. 05-2-0002 (Final Decision and Order, July 20, 2005)

The County's update requirement under RCW 36.70A.130 includes a requirement for a population allocation analysis. Whether the County was required to take further

compliance efforts with respect to its UGA boundaries and densities will depend, at least in part, on the population allocation analysis itself. *Futurewise v. Whatcom County*, WWGMHB Case No. 05-2-0013 (Order on Dispositive Motions, June 15, 2005).

This [update] requirement imposes a duty upon the County to bring its plan and development regulations into compliance with the GMA, including any changes in the GMA enacted since the County's adoption of its comprehensive plan and development regulations. While some provisions of the County's plan and development regulations may not have been subjected to timely challenge when originally adopted, a challenge to the legislative review required by RCW 36.70A.130(1) and (4) opens those matters that were raised by Petitioner in the update review process. See RCW 36.70A.280(2). *1000 Friends v. Thurston County*, WWGMHB Case No. 05-2-0002 (Final Decision and Order, July 20, 2005)

Urban Densities

[W]e do not find that the County's choice to use densities of 3.5 dwelling units per acre for certain residential portions of the Irondale and Port Hadlock UGA to be clearly erroneous. Because environmentally sensitive areas are present, lesser densities are justifiable. *Irondale Community Action Neighbors, et al. v. Jefferson County*, WWGMHB Case No. 04-2-0022 (Final Decision and Order, May 31, 2005) and *Irondale Community Action Neighbors v. Jefferson County*, WWGMHB Case No. 03-2-0010 (Compliance Order, May 31, 2005)

Urban Services

Public sanitary sewer is a key urban governmental service (RCW 36.70A.030[19]) Creating a non-municipal UGA to acknowledge pre-existing growth is only responsible if urban levels of services are provided within that non-municipal UGA. *Irondale Community Action Neighbors, et al. v. Jefferson County*, WWGMHB Case No. 04-2-0022 (Final Decision and Order, May 31, 2005) and *Irondale Community Action Neighbors v. Jefferson County*, WWGMHB Case No. 03-2-0010 (Compliance Order, May 31, 2005)